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RESPONSE REQUESTED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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No. 87-5096

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QUINCY WEST,

Petitioner,

v.

SAMUEL ATKINS,

Respondent

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BRIEF OF RESPONDENT  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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LACY H. THORNBURG  
ATTORNEY GENERAL OF NORTH CAROLINA

Jacob L. Safron  
Special Deputy Attorney General

Ruffin Building  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 733-7188

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I.

DID A PHYSICIAN WHO WAS UNDER CONTRACT TO PROVIDE ORTHOPEDIC SERVICES TO INMATES AT A STATE PRISON HOSPITAL ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 IN HIS TREATMENT OF A NORTH CAROLINA STATE PRISON INMATE?

II.

DO PRISON PHYSICIANS - WHETHER PERMANENT MEMBERS OF A STATE PRISON MEDICAL STAFF, OR UNDER CONTRACT WITH THE STATE PRISON SYSTEM - ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 LIABILITY IN THEIR TREATMENT OF STATE PRISON INMATES?

PARTIES

The parties to the proceedings below were the petitioner Quincy West, an inmate in the custody of the North Carolina Department of Correction, and defendants Samuel Atkins, Rae McNamara and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction to provide orthopedic services at North Carolina Central Prison Hospital at Raleigh, North Carolina, Rae McNamara was the former Director of the Division of Prisons of the North Carolina Department of Correction and James B. Hunt was the former Governor of the State of North Carolina.

The District Court dismissed the claims against defendants McNamara and Hunt as frivolous and the Fourth Circuit Court of Appeals dismissed the plaintiff's interlocutory appeal of that Order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of Defendant Hunt, but vacated the dismissal of Defendants Atkins and McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the District Court's dismissals of Defendants Atkins, McNamara and Hunt. Petitioner West does not challenge the dismissals of Defendants McNamara and Hunt and thus Defendant Samuel Atkins, a

physician formerly under contract to provide orthopedic services at North Carolina Central Prison Hospital, is the only respondent in the Petition for Certiorari.

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## OPINIONS BELOW

In an en banc opinion filed April 9, 1987 reported 815 F.2d 993 (4th Cir. 1987), the Fourth Circuit Court of Appeals dismissed the Petitioner's Complaint filed pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, against Samuel Atkins, a physician formerly under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital, Rae McNamara, former Director of the Division of Prisons of the North Carolina Department of Correction, and James B. Hunt, former Governor of the State of North Carolina. A copy of the en banc decision is attached as Exhibit A to Petitioner West's Petition for Writ of Certiorari.

The September 3, 1986 panel opinion of the Fourth Circuit Court of Appeals is reported at 799 F.2d 923 (4th Cir. 1986). The panel affirmed the dismissal of Defendant Hunt, but vacated the dismissals of Defendants Atkins and McNamara. A copy of the panel decision is attached as Exhibit B to the Petition for Writ of Certiorari. On November 12, 1986, the Fourth Circuit Court of Appeals ordered that the decision of the panel be vacated and set

the case for oral argument before the en banc court.

The June 7, 1985 Order of the United States District Court for the Eastern District of North Carolina dismissing the claims against Defendants Atkins, McNamara and Hunt is not reported and is attached as Exhibit D to the Petition for Writ of Certiorari.

From the en banc opinion of the Fourth Circuit Court of Appeals, West has filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

#### JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

#### STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, or regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

#### STATEMENT OF THE CASE AND FACTS

West tore the Achilles tendon in his left leg above his heel string while playing basketball on July 30, 1983 at the Odom Correctional Center at Jackson, North Carolina. Dr. Samuel Atkins, a physician on contract to provide two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, North Carolina, examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. On November 29, 1984, West filed a Pro Se complaint pursuant to 42 U.S.C. § 1983 against Dr. Atkins, James B. Hunt, Governor of the State of North Carolina, and Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Correction. In the complaint West alleged that Dr. Atkins

... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for badly torn Achilles tendon ...

As a result, West sought \$1,000,000.00 in compensatory and \$500,000.00 in punitive damages from Dr. Atkins, \$640,000.00 in compensatory and \$360,000.00 in punitive damages from Director McNamara, and a declaratory judgment against Governor Hunt.

The District Court made a determination of frivolity under 28 U.S.C. § 1915(d) and dismissed the claims against Hunt and McNamara and the Fourth Circuit Court of Appeals dismissed West's interlocutory appeal from that Order on April 3, 1985. WEST v. ATKINS, 760 F.2d 266 (4th Cir., April 3, 1985) (No. 85-6092) [Unpublished].

On June 7, 1985, citing CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), for the proposition that Dr. Atkins was not acting under color of state law for the purposes of § 1983, the District Court allowed Dr. Atkins' Motion for Summary Judgment and dismissed West's complaint. [Petitioner's Exhibit D]. Petitioner filed Notice of Appeal to the Fourth Circuit on June 17, 1985 and on September 3, 1986 a panel of the Court held that a determination of whether Dr. Atkins was deliberately indifferent to West's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for the purposes of § 1983. The grant of Summary Judgment to Dr. Atkins and Director McNamara's dismissal under the determination of frivolity under 28 U.S.C. § 1915(d) was vacated and the case remanded to the District Court. [Petitioner's Exhibit C].

On November 12, 1986, the Court ordered that the decision of the panel be vacated and the case set for oral argument before the en banc court. [Petitioner's Exhibit B]. On April 9, 1987 the en banc court perceived no valid reason to overrule or distinguish CALVERT v. SHARP, supra, and in reliance on POLK COUNTY v. DODSON, 454 U.S. 312 (1981), dismissed West's claims holding that Dr. Atkins was not acting under color of state law for purposes of § 1983. [Petitioner's Exhibit A]. From this

decision, Petitioner West seeks a Writ of Certiorari from this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

LACK OF FEDERAL COURT JURISDICTION

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins, an orthopedic surgeon who maintains a private practice at Raleigh, North Carolina and was under contract to conduct two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, examined West and concluded that surgery could be avoided if the tendon would grow back by itself. Dr. Atkins therefore placed West's leg in a cast and prescribed medication. In the complaint filed November 29, 1984 West alleged that Dr. Atkins

... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon. ...

The issue presented to this Court is identical to CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). In CALVERT the Fourth Circuit Court of Appeals reasoned as follows:

To maintain a § 1983 action a plaintiff must establish a jurisdictional requisite that the defendant acted under color of state law. POLK COUNTY, 454 U.S. at 315. A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Id. at 317-18 (quoting UNITED STATES v. CLASSIC, 313 U.S. 299, 326 (1941)). The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to the state. RENDELL-BAKER v. KOHN, 457 U.S. 830, 838 (1982). ...

\*\*\*\*\*

Unlike the attorney in POLK COUNTY, Dr. Sharp is privately employed. Private physicians exercise their own judgment and make their own medical decisions according to standards not established by the state. BLUM v. YARETSKY, 457 U.S. 991, 1008-09 (1982). Their physician-patient relationships are the same, with the same obligations and duties,

both within and without the prisons walls. A private physician is not, and by the nature of his function cannot be the servant of an administrative superior. See The American Medical Association Standards for Health Services in Prisons (Standard 102 states: "Matters of medical ... judgment are the sole province of the responsible physician.") (Emphasis in original). The American Medical Association Principles on Medical Ethics; The Hippocratic Oaths. The ethical obligations of physicians date back to the time of the ancient Greeks. E.g., the Hippocratic Oath.

In his brief Calvert recognizes that a physician owes his ethical obligation and undivided loyalty to his patient. The loyalty owed by Dr. Sharp was potentially adverse to the interests of the state. Dr. Sharp had no supervisor or custodial functions. Compare POLK COUNTY with ESTELLE v. GAMBLE, 429 U.S. 97 (1976), and O'CONNOR v. DONALDSON, 422 U.S. 563 (1975) (in ESTELLE v. GAMBLE the physicians were employed directly by the state and had custodial or supervisory functions. Sharp's functions and obligation was solely to cure orthopedic problems.

In exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical service to an inmate. See HALL v. QUILLEN, 631 F.2d 1154 (4th Cir. 1980); see also BLUM, 457 U.S. at 1008-09; cf. POLK COUNTY 454 U.S. at 319-24 (in which the Supreme Court discusses the obligations and functions of attorneys).

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Calvert and the trial court rely on ESTELLE v. GAMBLE to support the position that Dr. Sharp acted under color of state law by denying him medical attention. This reliance is misplaced. ESTELLE establishes that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. Nevertheless, a plaintiff must still establish that the defendant acted under color of state law. POLK COUNTY, 454 U.S. at 315. ESTELLE does not mandate, as CALVERT claims and the trial judge held, that a person who violates an inmate's Eighth Amendment rights is automatically acting under color of state law. Whether the physician acted under color of state law was not an issue in ESTELLE.

Furthermore, in POLK COUNTY, the Supreme Court distinguished ESTELLE and O'CONNOR v. DONALDSON, 422 U.S. 563 (1975) as follows:

O'CONNOR involves claims against a psychiatrist who served as the

superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients. On the contrary, it is his function to protect the interest of the public as well as that of his wards. Summarily, ESTELLE involved a physician who was the medical director of the Texas Department of Corrections and also the Chief Medical Officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity.

Because of their custodial and supervisory functions, the state employed doctors in O'CONNOR and ESTELLE faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the state, through the institution, attempts to achieve.

POLK COUNTY, 454 U.S. at 320.

Dr. Sharp is a privately employed specialist who treats private patients as well as inmates. He did not have any custodial or supervisory duties. His obligation was not to the mission of the state but to treat patients referred to him by other physicians. He did not act under color of state law.

In this case Dr. Atkins was not acting under color of state law. This result is dictated by CALVERT v. SHARP, *supra*. In that case a Maryland inmate brought a § 1983 action against the doctor for violation of his Eighth Amendment rights. The defendant doctor was a private orthopedic surgeon employed by Chesapeake Physicians, P.A. (CPPA), a non-profit corporation, employing numerous physicians and health personnel. CPPA provided medical services to the general public and also medical services to inmates through a contract with the State of Maryland. Calvert was referred to Dr. Sharp on five separate occasions from July 1980 to December 1981. Calvert alleged that Dr. Sharp did not treat him on these visits.

In CALVERT, the Fourth Circuit outlined four factors for a Court to apply when faced with the issue of whether a medical professional acted "under color of state law" when rendering

medical services to a state prisoner. The Court must ask:

1. Was there a "sufficiently close nexus" between the state and the medical professional's performance of his or her duties for the prison system, so that his or her conduct in these duties must be treated as that of the state itself?
2. In providing the medical services, was the medical professional exercising a function "traditionally the exclusive prerogative of the state"?
3. In providing the medical services, was the medical professional exercising his or her independent medical judgment without regard to state interests or deference to state authorities?
4. Was the medical professional performing any custodial or supervisory duties for the state prison system?

These factors must be balanced when determining whether the medical professional's actions were fairly attributable to the state. CALVERT at 862.

In holding that the defendant doctor did not act under color of Maryland law, the Fourth Circuit said "the professional obligation and functions of a private physician establish that such physician does not act under color of state law when providing medical services to an inmate." CALVERT at 863. On the contrary, privately employed physicians exercise their individual judgment and make their own decisions according to standards not established by the state. In fact the physician's loyalty is to his patients and is often adverse to the state. *Id.* The Fourth Circuit also noted that the defendant was not "dependent upon state funds" or performing a "public function," two factors considered to determine if a private act is done under color of state law.

The situation presented in this case is very similar to one presented in CALVERT. Specifically, Dr. Atkins is a private physician who contracted with the North Carolina Department of Correction to provide two orthopedic clinics per week to inmates at North Carolina Central Prison Hospital. Pursuant to the contract, Dr. Atkins received a weekly payment for his services but did not receive employee benefits. The doctor performed only medical duties and functions and did not have any supervisory or

custodial functions at Central Prison Hospital.

That the contract is a direct contract between Dr. Atkins and the state, unlike the situation in CALVERT where there was an intervening general contractor, does not dictate a different result. "Acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *RENDELL-BAKER v. KOHN*, 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418, 427 (1982). In *RENDELL-BAKER* this Court stated that:

The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in *POLK COUNTY v. DODSON*, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981). There we concluded that, although the state paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." *Id.* at 318. Here the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students.

The relationship between doctor and patient does not change because the state pays for the doctor. Dr. Atkins exercised independent medical judgment without regard to state authorities. Clearly, the balance weighs against finding that Dr. Atkins acted "under color of state law." A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *POLK COUNTY v. DODSON*, 454 U.S. 312, 317, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), quoting *UNITED STATES v. CLASSIC*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). In this case Dr. Atkins was not acting under color of state law.

## II.

### WEST'S EIGHTH AMENDMENT CLAIM

In order for an inmate to bring a claim of inadequate

medical care under 42 U.S.C. § 1983 the mistreatment or nontreatment must be capable of characterization as cruel and unusual punishment. Before a federal court will interfere with the internal operations of a state penal facility a prisoner's allegations must reach constitutional dimensions. *RUSSELL v. SHEFFER*, 528 F.2d 318 (4th Cir. 1975). However, "where a prisoner has received some medical attention and a dispute is over the adequacy of the treatment, federal courts are generally reluctant to second-guess medical judgments and to constitutionalize claims which sound in state tort law." *WESTLAKE v. LUCAS*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

In order to recover for a denial of medical treatment, the plaintiff must show deliberate indifference to serious medical needs. The test is whether such deliberate indifference would offend "evolving standards of decency" in violation of the Eighth Amendment. The complaint that a medical professional has been negligent in diagnosing the medical condition does not state a valid claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *ESTELLE v. GAMBLE*, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

## III.

### WEST'S NEGLIGENCE CLAIM

In any event, even if the district court had jurisdiction over Dr. Atkins, which it did not, under *BAKER v. MCCOLLAM*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), *ESTELLE v. GAMBLE*, *supra*, and *WESTER v. JONES*, 554 F.2d 1285 (4th Cir. 1977), West's complaint fails to state a cognizable claim for relief under § 1983. As the Fourth Circuit stated in *WESTER*:

...It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions. Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs. Consequently, Wester's own version of the facts do not support his claim for violation of the Eighth Amendment. We therefore conclude that the district court properly

granted summary judgment in favor of the prison authorities.

West's allegations arising out of his claim that Dr. Atkins

... Through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon ...

sets forth, at best, a negligence based claim. Negligence of prison officials is not actionable under § 1983. See DAVIDSON v. CANNON, 474 U.S. \_\_\_, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); DANIELS v. WILLIAMS, 474 U.S. \_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In these cases, this Court held that a due process deprivation does not arise from a "negligent act of an official causing unintended loss or injury to life, liberty of property." Furthermore, West's allegations do not amount to deliberate indifference to his medical needs. ESTELLE v. GAMBLE, supra. In any event, differences concerning a course of treatment do not amount to a constitutional violation. BOWRING v. GOODWIN, 551 F.2d 44, 48 (4th Cir. 1977).

#### CONCLUSION

In BAKER v. McCOLLAM, supra, the Court held that § 1983 does not impose liability for violations of duties of care arising out of tort law and the remedy for that type of injury must be sought in state court under traditional tort law principles. This Court noted, citing ESTELLE v. GAMBLE, supra, that just as medical malpractice does not become a violation of the federal constitution's prohibition of cruel and unusual punishment merely because the victim is a prisoner, false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. This Court's reasoning in BAKER v. McCOLLAM, supra, was expanded in PARRATT v. TAYLOR, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which this Court stated that:

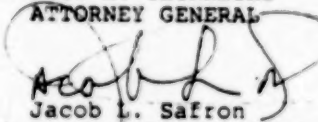
...to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting "under color of state law" into a violation of the Fourteenth Amendment

cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who was involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning would "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." PAUL v. DAVIS, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LACY H. THORNBURG  
ATTORNEY GENERAL

  
Jacob L. Safran  
Special Deputy Attorney General

North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 733-7188

ATTORNEYS FOR RESPONDENT ATKINS

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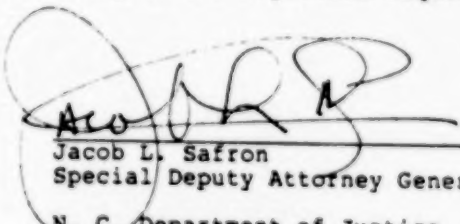
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Respondent

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CERTIFICATE OF SERVICE

I, Jacob L. Safron, a member of the bar of this Court, hereby certify that on the 25 day of September, 1987, a copy of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals in the above captioned case was mailed, first class postage prepaid, to Richard E. Giroux, Esq., Attorney for Petitioner, 112 South Blount Street, Raleigh, North Carolina 27601. I further certify that all parties required to be served have been served.



Jacob L. Safron  
Special Deputy Attorney General

N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 733-7188